

REMARKS

This substitute amendment is filed in response to the October 19, 2004 notice of non-responsive amendment, holding that "the reply filed on July 28, 2004 is not fully responsive to the prior office action".

The prior office action was a restriction requirement and hence the "reply" to it was the election with traverse filed July 28, 2004. The election paper did not amend claims. While it did allude to the preliminary amendment filed the same day (section 2), we believe it should have been entered regardless of whether the amendment complied with 37 CFR 1.121. (The Examiner is asked to confirm that it has been entered.)

Hence, the issue should have been whether the amendment was "non-compliant", not whether it was "non-responsive", as a preliminary amendment necessarily is not a "response" to an office action.

The October 19 paper did not particularize the problem with the amendment. However, in a telephone interview, the examiner advised Counsel that the problem was that the July 28 amendment added new claims 153-190. The Examiner said that claims 153-265 were presented on September 27, 2001, and that claims 153-258 and 260-265 were cancelled in February 2002. If so, then claims 153-258 and 260-265 should have been listed as cancelled, claim 259 listed as previously presented, and the new claims numbered 266+.

We agree that claims 153-265 were presented on September 27, 2001, and entered November 15, 2001. We also agree that the February 21, 2002 after final amendment proposed to cancel claims 153-258 and 260-265. However, this amendment was refused entry on June 4, 2002.

We then replaced it with three substitute amendments "A", "B" and "C", filed June 21, 2002, of which amendment "A" retained the instructions to cancel. However, it mistakenly referred to 153-158, not 258.

Amendment A (and C) were entered by the September 10, 2002 advisory action. Substitute Amendment B, which amended claim 148, was refused entry.

The oversight in substitute amendment A was recognized and a supplemental amendment, cancelling 159-258, was filed October 18, 2002. Its status was unknown at the time of the November 5, 2002 appeal brief. It was entered by the November 18, 2002 advisory action.

The June 18, 2004 paper reopened prosecution in this case. Hence, the substitute amendment B, filed under old 37 CFR 1.121 and previously denied entry, should have been entered as a matter of right. We alluded to this issue in section 1 of the July 28 election with traverse. In a short telephone interview on November 1 the Examiner confirmed that claim 148 should be presented here as amended by substitute amendment B, and marked as previously presented.

The October 18, 2004 paper says that the current status of previous claim 259 is "unclear". We don't think it was unclear. It is pending and it should have been examined for restriction. Hence, the June 18 action is incomplete.

We now repeat the remarks from the July 28, 2004 amendment, altered as needed to reflect the corrected numbering of the new claims.

Claims 78, 79, 81, 83, 84, 85, 122, 127 have been amended to eliminate dependency on cancelled claims. Claims 113-114 have been cancelled because they were singly dependent on cancelled claims. This in turn necessitated amendment of claims 78, 79, 81, 83, 84, 85 and 127 to eliminate dependency on 113-114.

The claims corresponding to unelected groups II-IV have been cancelled.

Immunogenic agent claims 266-303 are being added to better protect applicants invention. Original claims 18 and 19 were directed to immunogenic agents, and were examined together with applicant's kit claims for several years.

The terms "pediatric immunogen" and "non-pediatric immunogen" are formally defined in the specification, see P35, L20-P36, L10.

Respectfully submitted,

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